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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

B5

[redacted]

DATE: FEB 17 2012 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The AAO will dismiss the appeal.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. At the time he filed the petition, the petitioner stated that he intended to work as a [redacted]. The petitioner is now a postdoctoral [redacted] where he had previously earned his graduate degrees. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

On appeal, the petitioner submits a brief from counsel and supporting exhibits.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest. Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors to consider when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO also notes that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

The petitioner filed the Form I-140 petition on May 23, 2008. In an accompanying statement, [redacted], "associate attorney" to counsel, asserted that the petitioner "is a leader involved in cutting edge research and innovation related to the production of bio-fuels." Specifically, the petitioner's "research focuses on producing fuel for consumer consumption with animal waste." [redacted] asserted that the national interest waiver is in order because the petitioner:

> possesses a multidisciplinary background and a unique mind which has resulted in his ability to make unique and important contributions to this rapidly emerging and critical field of biofuel technologies. . . .

> [I]t is clear that [the petitioner] is an internationally reputed researcher, scientist, and innovator whose work in the United States related to converting animal waste products into consumer usable biofuels is benefiting the United States immensely in an era of ever-increasing prices for petroleum and all of the products linked to it.

The petitioner's initial submission included copies of six of his articles, published between 2005 and 2008. Five of these articles concerned biofuel fermentation; the sixth, "Improving Air-Cooled Condenser Performance in Combined Cycle Power Plants," discussed aspects of power generation unrelated to fuel source. The petitioner also submitted other evidence of professional activity including peer review and a conference presentation.

The most recent article, from 2008, indicated that all its authors, including the petitioner, were at NMSU. The initial submission did not include any direct evidence that the petitioner would continue to work with biofuels at Villanova University.

The director issued a request for evidence (RFE) on November 5, 2009, instructing the petitioner to submit further evidence and information about the petitioner's intended future work, and to establish eligibility for the national interest waiver.

The petitioner's response to the RFE indicated that he worked at Villanova University for only a few months, from August 2008 to October 2008, before returning to NMSU. The petitioner indicated that, since January 2009, he had worked as [redacted], in conjunction with the U.S. Department of the Interior's Brackish Groundwater National Desalination Research Facility. The petitioner stated that his work involved "[r]esearching the reuse of the salty water waste concentrate from desalination in algal biodiesel [*sic*] production." It is evident from a separate, more technical statement that the petitioner's current work focuses more on water purification than on fuel production; at best, his work involves treatment of the waste products from such fuel production. The petitioner's change of employers is not of serious concern here, because the petitioner sought an exemption from the job offer requirement and the nature of his intended work is much more important than where he would do that work. For the same reason, however, a change in the nature of the petitioner's intended work is of central importance to this proceeding.

An article in *Insight into Energy and the Environment*, an internal publication from NMSU's Institute for Energy and the Environment (IEE), described the petitioner's current work:

> He will be providing technical expertise in the field of desalination. . . .
>
> [The petitioner's] project duties include research and development of cost-effective technology for brackish water treatment under various tech-funded and Office of Naval [R]esearch/Bureau of Reclamation grants. He will mentor four master of science graduate candidates as well as providing technical support, modeling and project safety guidance.

> . . . [The petitioner] has international experience in water supply, infrastructure improvement projects, concrete quality control and installation, and renewable energy development and engineering.

The brief reference to "renewable energy development" is the only mention of the petitioner's previous biofuel work. The evidence, including statements from the petitioner's employer and the petitioner himself, make it clear that the petitioner has ceased to perform the animal waste biofuel research that had initially formed the basis for the petition. Nevertheless, counsel stated that the petitioner "is widely recognized for his pioneering role in the use of biofuels and biofuel technology in an age where the U.S. has become enslaved to the use [of] petroleum."

Counsel claimed the existence of "at least thirteen independent citations to [the petitioner's published] work." The accompanying exhibit list identified three citing articles by title and author, followed by a generic reference to "Six other science publications," for a total of nine claimed articles. The AAO can identify only eight of these articles in the existing record. Because counsel did not identify six of the articles, the AAO cannot determine which article is missing. Most of these articles cite the petitioner's biofuel work, with one article citing the petitioner's work on power plant cooling techniques.

The petitioner submitted a letter from [redacted], who supervised the petitioner's graduate studies at NMSU. [redacted] stated:

> I believe [the petitioner] has the necessary expertise and skills to make meaningful contributions in the field of alternate energy. . . .
>
> For his PhD dissertation, he has developed a new process for anaerobic digestion of cattle manure to produce energy and recycle nutrients. . . . His contribution to the body of knowledge in this area is novel, valuable, and practical. For example, the model that he has developed . . . can be generalized for application to other animal wastes as well as food wastes. I find this a remarkable contribution to the animal production industry as well as to waste management and sustainable energy production.

[redacted] did not mention or comment on the petitioner's more recent work with desalination. The petitioner did not establish that other researchers share [redacted] opinion of the work that the petitioner performed under [redacted] guidance.

The director denied the petition on February 2, 2010. In the denial notice, the director acknowledged the intrinsic merit and national scope of alternative fuel research, but stated that the petitioner had not shown that he stands out in that field to an extent that would warrant an exemption from the job offer requirement that normally applies to members of his profession.

On appeal, counsel asserts that "the record as [a] whole" establishes that the petitioner's "unique combination of education and experience as well as his pioneering role as a biofuel technology

researcher would benefit the national interest of the United States to a substantially greater degree than a similarly qualified U.S. worker."

The petitioner submits database printouts, indicating an aggregate total of 30 citations of five of the petitioner's articles (a sixth showed no citations). The petitioner also submits a printout from http://in-cites.com, which, counsel states, "demonstrat[es] that the global average [citation] rate for engineering is 3.17 per citation [*sic*] per paper while [the petitioner's] are far above the global average at a rate of 6.0 citation[s] per paper." The statistics relate to all papers published in the broad category of "engineering."

Counsel's figure divides 30 citations by five papers, and thereby disregards the petitioner's uncited sixth paper. Furthermore, only two of the petitioner's papers earned citations above the stated average of 3.17 per paper – one with 13 citations, and another with eight. The record identifies only some of the citing articles, and therefore it is not possible to tell how many of the citations of the petitioner's work are independent rather than self-citations by the petitioner and/or his co-authors. With respect to the petitioner's paper with eight citations, the record shows that three of the citations are self-citations by the petitioner's co-authors.

Most of the citations relate to the petitioner's biofuel work. As noted previously, the record indicates that the petitioner is no longer pursuing biofuel technology research. Even if this were not the case, the materials submitted served only to demonstrate that the petitioner had conducted biofuel research. The petitioner's published materials are not self-evidently superior to the work of others in the field, and the petitioner provided no objective basis for comparison.

The petitioner submits two new letters, both signed by [redacted] The March 20, 2010 letter signed by [redacted], who served on the petitioner's Ph.D. examination committee, states that the petitioner's "publications and citation [rate] clearly demonstrated that his researches from previous, current, and future has impact to the water, energy technology, energy independent, *energy security*" (*sic*; emphasis in original). Regarding the petitioner's current desalination work, the letter states that the petitioner's latest efforts have produced "two technical articles" for presentation at conferences. In one of those presentations, the petitioner "proposed a new operation and controlling parameter in Electro-dialysis Reversal . . . to reduce the desalination cost and subsequently [*sic*] reduce the energy" required for the process. The letter ends with the conclusion: "I personally feel [the petitioner] has demonstrated as a *technical leader in energy, water, and environments*" (*sic*; emphasis in original).

More details appear in a March 24, 2010 letter signed by [redacted]:

> In his research, he has developed a new operation and controlling parameter in Electro-dialysis Reversal as a "mean ions resident time (MIRT<130min" and a new criteria of mean ion resident time < 130 minute. By operation of the EDR with MIRT, <130min, acid and sodium hexametaphosphate (SHMP) can be eliminated in the EDR desalination (attachment 4), and this resulted in a *2 to 25%* reduction in the

> desalination cost and subsequently reduced the energy costs *38 to 42% (attachment 5).* Another article was resubmitted to *Desalination and Water Treatment Journal* with edited and update revision from Reviewers' Comments (see attachment 6). . . .
>
> I personnel [*sic*] feel that [the petitioner] has demonstrated that he is a *TECHNICAL LEADER in energy, water, and environments; his research have [sic] SIGNIFICANT IMPACT to energy independence, energy security, and water security at the past, present and in the future.*

(Emphasis in original.) While the letter refers to six "attachments," the letter appears in the record by itself, without the attachments. The letter also contains the claim that the petitioner's biofuel work has attracted 30 citations, whereas two of the 30 documented citations pertain to an article about power plant cooling rather than biofuels.

The Board of Immigration Appeals (BIA) has held that testimony should not be disregarded simply because it is "self-serving." *See, e.g., Matter of S-A-*, 22 I&N Dec. 1328, 1332 (BIA 2000) (citing cases). The BIA also held, however: "We not only encourage, but require the introduction of corroborative testimonial and documentary evidence, where available." *Id.* If testimonial evidence lacks specificity, detail, or credibility, there is a greater need for the petitioner to submit corroborative evidence. *Matter of Y-B-*, 21 I&N Dec. 1136 (BIA 1998).

The opinions of experts in the field are not without weight and have been considered above. USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Comm'r. 1988). However, USCIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; USCIS may, as we have done above, evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of V-K-*, 24 I&N Dec. 500, 502 n.2 (BIA 2008) (noting that expert opinion testimony does not purport to be evidence as to "fact"). USCIS may even give less weight to an opinion that is not corroborated, in accord with other information or is in any way questionable. *Id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l. Comm'r. 1972)). The petitioner in this instance has relied entirely on letters signed by NMSU faculty, one of which repeats one of counsel's errors of fact concerning the citation of the petitioner's work. The letters fail to establish the petitioner's influence or continued involvement in the field of biofuel research, which were the pillars of the initial filing.

The two letters submitted on appeal appear to have the same author as the letter quoted above. The AAO does not dispute the authenticity of the signatures on the letters, but notes that both letters contain similarly worded passages (such as the concluding sentences quoted above), seemingly arbitrary italicization, and significant grammatical errors that one would not normally associate with university professors.

The AAO notes that, in both letters, the word "subsequently" is hyphenated to read "sub-sequently." In the letter [redacted] signed, the word is split onto two lines, with the hyphen properly marking the division. In the letter attributed to [redacted], however, the word appears in the middle of a line where no hyphenation was necessary. Because the hyphenation makes sense only in the letter signed by [redacted], it appears that the letter signed by [redacted] acted as a template for the shorter letter signed by [redacted] (even though the letter signed by [redacted] is dated four days earlier).

Aside from questions about the origin of the two new letters, the petitioner was not yet working in desalination when he filed the petition. The initial filing rested entirely on his work with biofuels, which the petitioner claimed he was going to pursue at Villanova University. That position lasted less than three months, after which the petitioner returned to NMSU but not to biofuel research.

An applicant or petitioner must establish that he or she is eligible for the requested benefit at the time of filing the application or petition. 8 C.F.R. § 103.2(b)(1). USCIS cannot properly approve the petition at a future date after the petitioner or beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The petitioner's demonstrable abandonment of biofuel research means that the petitioner has not shown any prospective benefit from that research. At the same time, however, the petitioner had not yet begun his desalination work when he filed the petition; his subsequent efforts in that field cannot retroactively qualify him for a priority date that predates those efforts.

The petitioner has not shown that his previous biofuel research has had a significant impact on alternative energy research, much less on practical, real-world energy generation. For reasons unexplained, he ceased performing that research shortly after he filed the petition, and began working in desalination instead (while still relying heavily on his biofuel research as a foundation for the waiver). Even if this switch had happened prior to the filing date, the petitioner has established a minimal track record in his new research specialty. The petitioner has not shown that his research work, new or old, has attracted sustained interest outside of NMSU where he earned his degrees and to which he has now returned as a postdoctoral researcher.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.